BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN ANTHONY BOURBONNAIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 207,893
CAP CARPET, INC.	)	
Respondent	)	
AND	)	
	)	
OHIO CASUALTY INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and its insurance carrier sought review of the Award entered by Administrative Law Judge Jon L. Frobish on January 7, 1998. The Appeals Board heard oral argument on August 14, 1998.

APPEARANCES

The unrepresented claimant settled his claim, leaving only the respondent, its insurance carrier and the Workers Compensation Fund as the parties to this appeal. The respondent and its insurance carrier appeared by and through their attorney, Douglas D. Johnson of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Randall C. Henry of Hutchinson, Kansas.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

There are no stipulations by the parties listed in the Award but the parties did enter into a stipulation which was filed July 30, 1996, concerning the filing of three Form 88s. Also, the parties announced their agreement at the December 15, 1995 Settlement Hearing as to the accuracy of the facts on the Work Sheet for Settlements.

ISSUES

The Administrative Law Judge (ALJ) denied respondent's request to assess 100 percent liability against the Kansas Workers Compensation Fund (Fund) finding instead that the Fund should be responsible for only one-third of the benefits awarded claimant as a result of the low-back injury claimant sustained on March 15, 1992. Fund liability is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, for the reasons expressed below, the Award entered by the ALJ should be modified to assess 100 percent liability against the Fund.

The facts are not in dispute. Claimant had prior injuries to his back that resulted in his undergoing back surgery including a fusion in 1973. Claimant had an incomplete resolution of his symptomatology but was able to return to gainful employment. On March 15, 1992, claimant suffered an aggravation of his back condition while pulling up carpet at work. The Appeals Board finds claimant's present disability would not have occurred but for his preexisting impairment. Accordingly, 100 percent of the award should be assessed against the Fund.

The purpose of the Fund was to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. Morgan v. Inter-Collegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

> 'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions: . . .

15. Loss of or partial loss of the use of any member of the body;
16. Any physical deformity or abnormality;
17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. *See,* K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. *See*, K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

> In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto.

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to this former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. *See,* Denton v. Sunflower Electric Co-op, 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan, *supra*.

The Appeals Board finds that claimant was a handicapped employee at the time of his March 15, 1992 injury at work. The parties stipulated that respondent had filed three Form 88s, Notice of Handicap, Disability or Physical Impairment, with the Division of Workers Compensation concerning claimant's prior back injuries before the accident that is the subject of this claim. Mr. Clifford Pore, a co-owner of the respondent corporation,

testified that he knew claimant had back problems and physical limitations when he hired claimant over 20 years before. Thereafter, he let claimant be the judge of what he could and couldn't do. From Mr. Pore's testimony, together with the Form 88s and the medical evidence, the Appeals Board finds that at the time of claimant's injury, respondent had knowledge of a preexisting impairment that would constitute a handicap in obtaining or retaining employment.

The Fund also argues that the opinion of orthopedic surgeon Robert A. Rawcliffe, Jr., M.D., should be rejected and respondent found not to have carried its burden of proof that claimant's disability probably would not have occurred but for his preexisting impairment.

K.S.A. 1991 Supp. 44-567(a)(2) provides that Fund liability is to be determined "in a manner which is equitable and reasonable . . . ." It does not prescribe the requisite evidence the trier of fact must follow. Expert testimony from a physician is certainly helpful but it is not necessarily required, nor is it always to take a certain form.

Dr. Rawcliffe gave an opinion based upon a reasonable degree of medical certainty to the effect that but for claimant's preexisting impairment the second accident probably would not have occurred. Dr. Mills agreed with Dr. Rawcliffe that claimant's work-related injury and resulting disability most likely would not have been as severe but for the preexisting condition. Although he is not as clear on cross-examination, Dr. Mills appears to disagree with Dr. Rawcliffe as to whether or not the injury would have happened without the preexisting handicap. The ALJ seemed to focus on this testimony. But this is not the only test for whether the Fund should assume full liability for an award of compensation. The test is whether it has been shown that the change in the physical structure of the claimant's body (the injury) or whether the resulting impairment (disability) probably or most likely would not have occurred but for the preexisting physical impairment. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 573 P.2d 1025 (1978); Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984). Dr. Rawcliffe testified that in his opinion claimant's work-related accident and the resulting increase in claimant's disability would not have occurred but for the preexisting condition. His opinion was unequivocal and is accepted by the Board as competent and reasonable.

Also, the fact that Dr. Philip Mills may be of a different opinion concerning the extent of degenerative changes and the percentage of impairment that preexisted is of little consequence to the issue of Fund liability and does not refute Dr. Rawcliffe's opinion on the Fund liability issue.

The Appeals Board finds Dr. Rawcliffe's testimony to be the more persuasive on the issue of Fund liability. Based upon the record as a whole, the Appeals Board finds that liability for the cost of the settlement award for the accident of March 15, 1992, should be assessed 100 percent against the Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated January 7, 1998, should be, and is hereby, modified to award 100 percent of the cost of the settlement award entered December 15, 1995, by Special Administrative Law Judge James R. Roth against the Workers Compensation Fund.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Fund as follows:

Alexander Reporting Co.	
Deposition of Robert A. Rawcliffe, Jr.	$135.40
Deposition of Clifford Pore	$122.35
Ireland Court Reporting, Inc.	
Deposition of Philip Mills, M.D.	$151.10

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Douglas D. Johnson, Wichita, KS
Randall C. Henry, Hutchinson, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director